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Supreme Court of the United States

October Term, 1953

No. 599

GENERAL ELECTRIC COMPANY,
a Corporation,
Petitioner,

vs.

AVERILLE L. PORTER,
Respondent.

REPLY BRIEF ON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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REPLY TO STATEMENT

Petitioner has never contended that Richland and North Richland were incorporated municipalities of the State of Washington, nor that the community firemen were exempt under 29 U.S.C. 203(d), which exempts such

municipalities from the Act. Petitioner has referred to Richland and North Richland as communities, as does the contract between the parties and the trial court's Findings of Fact. R. 93, Pl. Ex. 5, Article II, Section 9, R. 117. It was agreed that the firemen protected all persons and property within these two communities from hazards of fire, undisputed that the firemen received the training of ordinary municipal fire departments, and that the two-platoon system is the system most commonly used by municipal fire departments in the State of Washington. R. 232, 234, 337, 343. Thus, the duties, training, and system of employment were like those of municipal fire departments.

Both the trial court and the Court of Appeals held that, on the change-over to the two-platoon system, the firemen by continuing to work agreed to their new conditions of employment. R. 94, 95, 467. The question is neither crucial nor important in connection with this petition for *certiorari*, as the only questions raised are whether the community firemen of Richland and North Richland are both closely related and directly essential to the production of goods for commerce and the question of whether the Court of Appeals was free to ignore the findings of the trial court with regard to sleeping time and substitute its own judgment therefor. Respondent has filed no cross-petition for *certiorari* on any other issue.

Respondent unwarrantedly distorts the effect of the firemen's so-called protest. The trial court's finding was as follows:

"Prior to March 20, 1950, plaintiff firemen were working regular eight-hour shifts and were paid on an hourly basis. On said date defendant changed their employment over to the two-platoon system *as above described* without agreement with and over the protest of plaintiff firemen. However, they continued working."

(Emphasis supplied) R. 95.

The "two-platoon system *as above described*" was a two-platoon system with 24 hours on and 24 hours off. R. 94. The protest referred to in the quoted finding is in evidence as Exhibit 7 and is dated March 23, 1949, almost one year prior to the inauguration of the two-platoon system. R. 140, 141. This was a petition by some firemen for a variation of the two-platoon system under which the two platoons would rotate on the basis of a 10-hour day and 14 hours at night. It could be construed as a protest against the two-platoon system of 24 hours on and 24 hours off, although it is in the form of a request for a different variation of the two-platoon system, and is not a request for retention of an eight-hour shift. R. 360-361. The trial court in his finding construed this Exhibit 7 as a protest, not against the two-platoon system, but against the proposed 24 on and 24 off as opposed to the 10 and 14.

The respondent states at page 4 of his brief that the trial court did not pass upon the question of whether the community firemen were in a standby capacity for plant protection. This is not in accord with the facts. The respondent alleged (R. 5, 7) that the firemen were en-

gaged in guarding a portion of Hanford Works known as the 300 Area which was operational in character and proposed as Finding of Fact XI, the following:

> "A portion of the Hanford Works known as the '300 Area' is operational in character. It lies within the barricaded area. Plaintiff and his assignors were subject to call and were called to protect said '300 Area'."

This proposed finding was rejected by the trial court which instead found that the production units in the barricaded plant area were protected against the hazard of fire by the plant fire department, while the communities were protected by their separate community fire department. R. 93.

Despite the trial court's finding, the Court of Appeals found that the firemen served in a standby capacity to protect the barricaded production area. R. 456, 463.

The trial court based his finding that the firemen did not operate in a standby capacity on undisputed facts. The supervision of the plant fire department was separate and distinct from that of the community fire department; the union affiliations of the firemen were different; the plant firemen worked a 40 hour week with an hourly wage, while community firemen were on the two-platoon system with a monthly wage; and, there was no right of transfer between the departments. The plant firemen received the training of industrial firemen plus *special training on radiation hazards,* while the community fire-

men received the usual training for municipal firemen with *no* training on radiation hazard. R. 156, 157, 163, 180, 181, 200, 201, 206, 207, 211, 255, 260, 261, 309-313, 322-324, 335, 342, 343, 349, 351-353, 357, 358, 373-377.

The trial court realized that the production units at this plant were atomic piles and that to send untrained community firemen into an atomic pile with which they were unfamiliar would be gross negligence. The Court of Appeals did not agree with the trial court and substituted its own judgment because on one occasion a fire truck from North Richland, in responding to a fire call from an Army officer, went to the 300 Area by mistake but found no fire, and on a second occasion, an explosion in the 300 Area, four men with one fire truck from the community fire department went to the scene, entered a restricted building, and were promptly hospitalized for fear of radiation exposure. R. 131, 145, 147, 163, 200, 201, 206-208, 255, 256, 260-262, 351, 353, 373, 377. The latter incident, of course, emphasizes the trial court's belief that petitioner could not have intended to use untrained firemen in the atomic piles. The Court of Appeals did not state that the District Court was clearly erroneous, but again freely substituted its own judgment.

REPLY ON JURISDICTION

The jurisdictional statement is in conformity with the well-established practice and complies with paragraph 1 of Rule 12, Section 1, Rules of the Supreme Court. For

example, see: *Alaska Steamship Co. v. Petterson,* October Term 1953, No. 287, *Certiorari* granted, December 14, 1953.

REPLY TO SPECIFICATIONS OF ERROR

Rule 38(2) requires no specifications of error in the petition. Petitioner filed no brief in support of its petition.

REPLY ON IMPORTANCE

It is true that the exact factual situation in the case at bar may be unusual. This court has recognized that no formula will fit all cases and that in each case whether such sleeping time falls within or without the Act depends upon the facts of the particular case. *Skidmore v. Swift,* 323 U. S. 134, 65 S. Ct. 161, 89 L. Ed. 124. The facts of this case do give the opportunity to resolve important principles of wide application.

That 29 U.S.C. 203(j) affects the coverage of many under the Act for both minimum wages and overtime is readily apparent from the House Manager's Statement, Appendix C of Petition, and Sections 776.18(a) and (b) of the Administrator's Bulletin, pages 32-33 of Petition, wherein he gives some examples of covered and non-covered employment under Section 203(j). The volume of litigation under this section prior to amendment has been large, as the Congress noted. (Appendix B, Respondent's Answering Brief.)

The definition of "closely related" and "directly essential" will be of universal application. The dividing line between essentially local activities and those where Congress intended coverage under the narrowed language will have the widest application. This Court has already posed the question of the proper dividing line between substantial and insubstantial relationship of employees to production of goods but has passed the question, as it was not before it. *Gangi v. D. A. Schulte, Inc.*, 328 U. S. 108, 66 S. Ct. 925, 90 L. Ed. 1114, footnote 15.

This is a section with widespread economic effect. The principles and dividing lines on coverage involved in this case are of widespread application and the facts are such that the case lends itself to an authoritative decision.

CONFLICT

Respondent at page 10 of his Brief refers to the conflict herein as an "obscure procedural" conflict. In *Bell v. Porter*, 7 Cir. 1946, 159 F.(2d) 117, the trial court found that the sleeping time of the firemen involved was compensable working time. The Court of Appeals reversed, holding that it was free to substitute its judgment for the finding of the trial court. In the case at bar we have the reverse, the trial court finding that such sleeping time was not compensable time worked, and the Court of Appeals substituting its judgment and reversing. It appears to us that this is a sword that cuts both ways, and cuts deep. Certainly, it has had a substantial effect upon the

rights of employer and employee alike, whether it is a rule of substantive law or not.

Whatever may be the holding of the Courts with regard to gift taxes and the peculiarities found in appeals from the Board of Tax Appeals, the findings of fact by the master as to what constitutes work time under this Act in *Anderson v. Mt. Clemens Pottery Co.*, 328 U. S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515, cannot be distinguished from the findings of fact by the trial Judge in the case at bar. In that case this Court held the findings could not be set aside unless clearly erroneous. If the findings of the trial court in that case are adequate and appropriate findings of ultimate fact, those in the case at bar are likewise. If that case be sound, then the opinion of the Court of Appeals in this case is unsound.

The importance of *Van Dyke v. Bluefield Gas Company*, 25 CCH Labor Cases Par. 68,161, arises out of this situation. In a long, unbroken line of cases involving the sleeping time of firemen working under a two-platoon system like that here involved and related cases, the courts have held that such sleeping time was not compensable working time. See: *Bowers v. Remington Rand, Inc.*, (7 Cir., 1946), 159 F.(2d) 114 Cert. denied 331 U.S. 864, 67 S. Ct. 1083, 91 L. Ed. 1288, reh. denied 330 U.S. 864, 67 S. Ct. 1198, 91 L. Ed. 1869; *Bell v. Porter*, (7 Cir. 1946), 159 F.(2d) 117, Cert. denied 330 U.S. 813, 67 S. Ct. 1092, 91 L. Ed. 1267, Reh. denied 330 U.S. 813, 67 S. Ct. 1198, 91 L. Ed. 1869; *Bridgeman v. Ford, Bacon & Davis, Inc.* (8 Cir. 1947), 161 F.(2d) 962; *Johnson v. Dierks Lumber & Coal*

Co., (8 Cir. 1942), 130 F.(2d) 115; *Wantock v. Armour & Co.*, (7 Cir. 1944), 140 F.(2d) 356, Affd. 323 U.S. 126, 65 S. Ct. 165, 89 L. Ed. 649; *McGregor v. Trojan Powder Co.*, (D.C. Ohio, 1946) 11 CCH Labor Cases 70118; *Muldowney v. Seaburg Elevator Co.*, (D.C. N.Y. 1941) 39 F. Supp. 275; *Plummer v. Harvester War Depot, Inc.*, (D.C. N.Y., 1946) 70 F. Supp. 495; *Buckner v. Armour & Co.*, (D.C. Tex., 1942) 53 F. Supp. 1022; *Skidmore v. Swift & Co.*, (1944), 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124; *Eustace v. Fed. Cartridge Corp.*, (D.C. Minn., 1946), 66 F. Supp. 55. In each of these cases the Court considered the question of whether there were adequate facilities and reasonable opportunity for sleep and based its decision thereon. Yet, in some of these cases, because the firemen were paid an hourly wage, it was necessary to make an allocation of paid and unpaid hours, for otherwise pay could not have been calculated. In *Van Dyke v. Bluefield Gas Company, supra*, however, we have, like in the case at bar, a monthly wage and no agreement as to what should constitute hours worked, since there was no occasion for it. Under these circumstances the Court did just what the trial court did in the case at bar—looked to see whether there were adequate facilities and reasonable opportunity for sleep.

In *Skidmore v. Swift*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124, involving the compensability of sleeping time of firemen under the Act, this Court did hold that the trial court should consider the agreement between the parties. The Court of Appeals has stated there was "absence of an express or implied agreement as to sleep-

ing time" in the case at bar. R. 472. But in *Skidmore v. Swift, supra*, this Court, in speaking of the Administrator's regulations, further held on sleeping time of firemen, as follows:

> ". . . the general tests which he has suggested point to the exclusion of sleeping and eating time of these employees from the work week and the inclusion of all other on call time; although the employees were required to remain on the premises during the entire time, the evidence shows that they were rarely interrupted in their normal sleeping and eating time, and these are pursuits of purely private nature which would presumably occupy the employees' time whether they were on duty or not and which apparently could be pursued adequately and comfortably in the required circumstances."

Aside from any agreement as to what constitutes compensable time worked, the principal tests for determining whether sleeping time of firemen was work time have been the adequateness of facilities and the opportunity for reasonably uninterrupted sleep. The Court of Appeals recognized there was no agreement, express or implied, in the case at bar. R. 472.

The trial court in the case at bar, on substantial evidence, found these firemen had reasonable opportunity for eight hours sleep. R. 94. The Court of Appeals found to the contrary. R. 473, 474. Is the finding by the trial court that these firemen had reasonable opportunity for eight hours sleep a mixed question of fact and law for which the Court of Appeals can freely substitute its own judgment? Clearly, it is not.

CONCLUSION

The principles involved in the issue of whether the community firemen of Richland and North Richland, Washington, were closely related and directly essential to the production of goods for commerce are of such substantial importance and of such widespread application that an authoritative decision of this Court is essential.

The theory that a trial court's finding of fact as to what is compensable time worked is a mixed question of law and fact and that an appellate court may substitute its judgment therefor, without regard to Rule 52(a), Rules of Civil Procedure, is in conflict with the decisions of this Court and other Courts of Appeal. It is a question which very substantially affects the rights of an appellant under this Act—be he employer or employee.

Accordingly, petitioner prays that *certiorari* be granted herein.

Respectfully submitted,

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CERTIORARI DENIED